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The Supreme Court of the United States
OCTOBER TERM, 1949

No......

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

vs.

L. C. HASELDEN, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

To the Honorable The Supreme Court of the United States:

Atlantic Coast Line Railroad Company, your petitioner, respectfully shows:

I

Summary Statement of the Matters Involved

On October 6, 1947, the respondent, L. C. Haselden, a section master of the petitioner, Atlantic Coast Line Railroad Company, commenced an action in the Court of Common Pleas of Darlington County, South Carolina, against Atlantic Coast Line Railroad Company, your petitioner, under the Federal Employers' Liability Act (U. S. C., Title 45, secs. 51-59) seeking to recover damages in the sum of fifty thousand dollars ($50,000.00) on account of personal injury alleged to have been sustained by respondent while he

and his section crew were loading rails on a gondola car at Society Hill, South Carolina, it being alleged in the complaint (R. 6) that the injury was sustained when "in the process of loading the car with said rails, one rail which was bent caught on the gondola on which they were being loaded, causing the loose end to spring over, striking plaintiff, knocking him down, injuring his leg and crushing his foot." It was also further alleged that the injury was due to the negligence of the defendant, Atlantic Coast Line Railroad Company, in the following particulars (R. 6, 7):

> "a. In failing to provide plaintiff with a safe place to work in that he was directed to load heavy iron rails across a ditch.
>
> "b. In failing to provide plaintiff with a safe place to work in directing him to load heavy iron rails with improper equipment and with faulty and weak skids with which to load said rails.
>
> "c. In failing to provide plaintiff with a safe place to work in that he was not given sufficient help with which to load said rails.
>
> "d. In failing to provide plaintiff with a safe place to work after notice that the same was insufficient.
>
> "e. In failing to provide plaintiff with proper, adequate, and safe tools and equipment with which to work.
>
> "f. In failing to provide plaintiff with proper, reasonable, and safe plans and method with which to work in loading said rails as herein set forth.
>
> "g. In failing to provide plaintiff with proper supervision and direction with which to work.

"h. In allowing said rail to become caught and suddenly spring loose, striking plaintiff without warning."

Your petitioner, Atlantic Coast Line Railroad Company, denied the allegations of negligence, and the case came on for trial before the Court and a jury in the Court of Common Pleas of Darlington County, South Carolina, on May 10, 1948.

Respondent offered no testimony at all other than his own as to the manner in which his injury occurred. He testified that he was instructed by the roadmaster, his immediate superior, to load ten rails on a car and ship them to McFarlane, N. C., that in loading the rails it was necessary to move them across a ditch, that he requested a flat car on which to load the rails, but that instead of a flat car being sent he received a gondola car (R. 28-29). He thus states the manner in which his injury was received (R. 29-30):

"Q. Would you just show the jury here exactly how you proceeded to load those rails?

"A. The rails were over here, we put the rail up and put a rope around there and pulled it up within six or eight inches of the top.

"Q. Where were you?

"A. Inside the car.

"Q. Where were the other men?

"A. Three men on the ground and myself and two men in the car. We pulled the rail on this end to about six or eight inches and then tied the rope over here and go back and pull this end of the rail up until we got it within our reach. The men on the ground pushed and stayed there until the men could come around the car and get in, by taking the rope off while they were coming around and walking over and laid it on the end

> of the car and I turned around, came back and the men pulled the rail just as I was walking up the car and the rail turned and come on me and hit my leg, and I slipped down and my leg jerked me back into it."

He then further testified in substance that if a flat car instead of a gondola car had been sent the rail could have been loaded more easily and safely (R. 30).

At the conclusion of respondent's testimony petitioner moved for a nonsuit on the ground that there was a failure of proof of actionable negligence, and at the conclusion of all the testimony moved for a directed verdict generally on the same ground. Both of these motions were overruled. After its motion for a directed verdict generally was overruled petitioner moved for a directed verdict as to each specification of negligence separately on account of failure of proof, and all of these motions were also overruled. The case was then submitted to the jury upon the testimony presented and the charge of the presiding Judge. With other instructions not deemed relevant, the presiding Judge charged the jury as follows as to the measure of the duty of the master to furnish a safe place to work and safe tools and appliances (R. 99):

> "Now, I charge you, gentlemen, that there is a positive duty on the part of the master to furnish the servant with reasonably safe instrumentalities wherewith and places wherein to work. The master is required to furnish his servant with such proper tools and appliances as may be required for the reasonable safe prosecution of the work. To make the master liable for failure to furnish tools and appliances it must be shown that the tools and appliances were necessary, and that they were not at hand at the time."

The jury rendered a verdict in favor of respondent against petitioner for the sum of forty-five thousand dollars ($45,000.00), and after the return of the verdict petitioner moved for judgment in its favor *non obstante veredicto*, on the grounds upon which its motions for nonsuit and for directed verdict were based, and it also moved in the alternative for a new trial on the ground, with other grounds not now deemed relevant, that the plaintiff had failed to prove any actionable negligence on the part of the defendant (R. 104-105). By an order dated June 24, 1948, petitioner's motions were overruled (R. 106-116).

Pursuant to the verdict of the jury and the order of the Court judgment was thereafter entered in the Court of Common Pleas of Darlington County, South Carolina, in favor of respondent and against petitioner for the sum of forty-five thousand dollars ($45.000).

Petitioner appealed to the Supreme Court of South Carolina from the judgment of the Court of Common Pleas of Darlington County, South Carolina, alleging error on the part of the trial Court in the following particulars, and also in other particulars not now deemed relevant: (1) in refusing petitioner's motions for a nonsuit, for a directed verdict generally, for a directed verdict as to each separate specification of negligence, and for judgment *non obstante veredicto*, or for a new trial in the alternative, on account of failure of proof of actionable negligence on the part of petitioner (R. 116-121); (2) in giving to the jury the charge above quoted in relation to the measure of the duty of the master to furnish a safe place to work and safe tools and appliances (R. 120).

Petitioner's appeal having been heard, the Supreme Court of South Carolina on April 1, 1949, filed an opinion affirming the judgment of the Court of Com-

mon Pleas of Darlington County, South Carolina, but on April 11, 1949, within the time permitted under the rules of practice prevailing in the State of South Carolina, petitioner filed a petition for a rehearing (R. 146), which suspended the finality of the State Court's judgment pending the Court's further determination as to whether its judgment should be modified so as to alter its adjudication of the rights of the parties. On April 26, 1949, the Supreme Court of South Carolina filed an order refusing and dismissing the petition for rehearing. Under the practice prevailing in South Carolina no final judgment separate and apart from the opinion of the Supreme Court of the State is rendered (Clerk's Certificate, R. 155), and upon the refusal of petitioner's petition for rehearing on April 26, 1949, the opinion of the Supreme Court of the State of South Carolina, which is the highest Court of the State, became the final judgment in the cause.

II

Statement of Basis Upon Which it Is Contended That Supreme Court Has Jurisdiction

The basis upon which it is contended that this Court has jurisdiction to review the judgment of the Supreme Court of South Carolina in this case is that the case was brought, tried and decided under the Act of the Congress of the United States commonly referred to as The Federal Employers' Liability Act. (U. S. C., Title 45, sections 51-59), and under that Act this Court is vested with the final authority to determine all questions as to the weight and sufficiency of evidence to support a verdict and as to the rights and obligations of the parties arising by virtue of the provisions of the Act. *Brady vs. Southern Ry Co.*, 320 U. S., 476.

III

The Questions Presented

The following are the questions here presented for consideration. (1) Was there sufficient evidence of negligence to justify the submission of the case to the jury? (2) Was there prejudicial error in the refusal to withdraw all or at least some of the separate specifications of negligence from the consideration of the jury on account of insufficiency of proof? (3) Was the jury erroneously instructed as to the duty of the master in relation to furnishing a safe place to work and safe tools and appliances?

IV

Reasons Relied on for Allowance of Writ

The decision and judgment of the Supreme Court of South Carolina is not in accord with applicable decisions of this Court in relation to Federal questions, and your petitioner alleges that a writ of certiorari should be granted by this Court to review and reverse the judgment of the Supreme Court of South Carolina herein for the following reasons:

(1) There was a failure of proof of any actionable negligence on the part of petitioner and petitioner's motion for a nonsuit on that ground (R. 52) should have been granted.

(2) There was a failure of proof of any actionable negligence on the part of petitioner, and petitioner's motion for a directed verdict on that ground (R. 93) should have been granted.

(3) Petitioner's motion for a directed verdict (R. 93) as to specification of negligence designated (a) in

paragraph 8 of the complaint should have been granted on account of failure of proof of negligence in that respect, the said specification being as follows: "In failing to provide plaintiff with a safe place to work in that he was directed to load heavy iron rails across a ditch." (R. 6).

(4) Petitioner's motion for a directed verdict (R. 93) as to specification of negligence designated (b) in paragraph 8 of the complaint should have been granted on account of failure of proof of negligence in that respect, the said specification being as follows: "In failing to provide plaintiff with a safe place to work in directing him to load heavy iron rails with improper equipment and with faulty and weak skids with which to load said rails." (R. 6).

(5) Petitioner's motion for a directed verdict (R. 93) as to specification of negligence designated (c) in paragraph 8 of the complaint should have been granted on account of failure of proof of negligence in that respect, the said specification being as follows: "In failing to provide plaintiff with a safe place to work in that he was not given sufficient help with which to load said rails." (R. 7).

(6) Petitioner's motion for a directed verdict (R. 93) as to specification of negligence designated (d) in paragraph 8 of the complaint should have been granted on account of failure of proof of negligence in that respect, the said specification being as follows: "In failing to provide plaintiff with a safe place to work after notice that the same was insufficient." (R. 7.)

(7) Petitioner's motion for a directed verdict (R. 93) as to specification of negligence designated (e)

in paragraph 8 of the complaint should have been granted on account of failure of proof of negligence in that respect, the said specification being as follows: "In failing to provide plaintiff with proper, adequate, and safe tools and equipment with which to work." (R. 7.)

(8) Petitioner's motion for a directed verdict (R. 93) as to specification of negligence designated (f) in paragraph 8 of the complaint should have been granted on account of failure of proof of negligence in that respect, the said specification being as follows: "In failing to provide plaintiff with proper, reasonable, and safe plans and method with which to work in loading said rails as herein set forth." (R. 7.)

(9) Petitioner's motion for a directed verdict (R. 93) as to specification of negligence designated (g) in paragraph 8 of the complaint should have been granted on account of failure of proof of negligence in that respect, the said specification being as follows: "In failing to provide plaintiff with proper supervision and direction with which to work." (R. 7.)

(10) Petitioner's motion for a directed verdict (R. 93) as to specification of negligence designated (h) in paragraph 8 of the complaint should have been granted on account of failure of proof of negligence in that respect, the said specification being as follows: "In allowing said rails to become caught and suddenly spring loose, striking plaintiff without warning." (R. 7.)

(11) The Court below was in error in sustaining the following charges to the jury as a correct statement of the law:

"Now, I charge you, gentlemen, that there is a

positive duty on the part of the master to furnish the servant with reasonably safe instrumentalities wherewith and places wherein to work. The master is required to furnish his servant with such proper tools and appliances as may be required for the reasonable safe prosecution of the work. To make the master liable for failure to furnish tools and appliances it must be shown that the tools and appliances were necessary, and that they were not at hand at the time." (R. 99.)

This charge is believed to have been erroneous and prejudicial for the reason that from it the jury might well have understood that the duty of the master in relation to the reasonable safety of the instrumentalities wherewith and the places wherein to work is an absolute one, thereby placing upon petitioner a heavier burden than the law exacts, in that the master 'is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end." *Lehigh Valley R. R. Co. vs. Beltz* (C. C. A. 2nd. Cir.), 10 Fed. (2d), 74; *Yazoo and Mississippi Valley R. Co. vs. Mullins*, 249 U. S., 531; *B. & O. S. W. R. Co. vs. Carroll*, 280 U. S., 491.

(12) The State Court was in error in refusing petitioner's motion for judgment *non obstante veredicto* or for a new trial in the alternative on account of insufficiency of proof of any actionable negligence on the part of petitioner. (R. 104, 105.)

WHEREFORE, Atlantic Coast Line Railroad Company, your petitioner, prays that a writ of certiorari be issued to the Supreme Court of the State of South Carolina to the end that this cause may be reviewed and determined by this Court as provided by law, and

that upon such review the judgment of the Supreme Court of South Carolina be reversed.

Atlantic Coast Line Railroad Company

By CHARLES COOK HOWELL,
Wilmington, N. C.

V. E. PHELPS,
Wilmington, N. C.

Attorneys for Petitioner,
Atlantic Coast Line Railroad Company

T. D. PAULLING,
Darlington, S. C.

JOHN F. WILMETH,
Hartsville, S. C.

A. F. WOODS,
Marion, S. C.

M. C. WOODS, JR.,
Marion, S. C.

Of Counsel.

The Supreme Court of the United States
OCTOBER TERM, 1949

No......

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

vs.

L. C. HASELDEN, *Respondent.*

BRIEF OF PETITIONER

Official Report of Opinions Delivered in the Courts Below

The decision of the Supreme Court of South Carolina has not yet been officially reported. It will be found on page 126 of the record, and in 53 S. E. (2d), page 60, Advance Sheets of May 26, 1949.

Statement of Grounds of Jurisdiction

This has already been set forth in the preceding petition (page 6), and the statement there found is here adopted by reference.

Statement of the Case

Under the heading "Summary Statement of the Matters Involved" in the preceding petition (page 1) a sufficient statement will be found to understand the

case, and what is there said is here adopted by reference.

Specification of Assigned Errors

Under the heading "Reasons Relied on for Allowance of Writ' in the preceding petition (page 7) will be found a full statement of the errors intended to be urged by petitioner as reasons for allowance of the writ, and that part of the petition is here adopted by reference. For convenience, however, the errors there alleged are here summarized as follows:

(a) The State Court erred in holding that there was sufficient proof of actionable negligence on the part of petitioner to justify a verdict in favor of respondent. The question as to the sufficiency of the evidence was made by petitioner in the trial Court by motion for nonsuit (R. 52), by motion for a directed verdict (R. 93), and by motion for judgment *non obstante veredicto* or for a new trial in the alternative (R. 104, 105), and in the Supreme Court of South Carolina by Exceptions 1 (R. 116), 3 (R. 117), 15 (R. 121), and 17 (R. 121).

(b) The State Court erred in sustaining the submission by the trial Court for the consideration of the jury of specifications of negligence not supported by evidence and not a proximate cause of the injury of respondent. The question as to the sufficiency of the evidence to justify the submission of these specifications of negligence to the jury was raised by petitioner in the trial Court by motion for directed verdict (R. 93, 94) and in the Supreme Court by Exceptions 5 (R 117), 6 (R. 117, 118), 7 (R. 118), 8 (R. 118), 9 (R. 118, 119), 10 (R. 119), 11 (R. 119), and 12 (R. 119).

(c) The Supreme Court of South Carolina erred in

sustaining the trial Court's charge to the jury as to the extent of the employer's duty in relation to furnishing a safe place to work and safe tools and appliances with which to work. This question was made in the Supreme Court of South Carolina by Exception 14 (R. 120, 121).

ARGUMENT

Point I

Was There Sufficient Evidence of Actionable Negligence to Justify the Submission of the Case to the Jury?

As will be seen from the foregoing petition, the respondent, L. C. Haselden, a section master of the petitioner, has recovered judgment against petitioner for forty-five thousand dollars ($45,000.00) in an action under the Federal Employers' Liability Act on account of personal injury alleged to have been sustained while he and his section crew of five men were loading rails on a gondola car. It was alleged in the complaint (R. 6) that the injury was sustained when "in the process of loading the car with said rails, one rail which was bent caught on the gondola on which they were being loaded, causing the loose end to spring over, striking plaintiff, knocking him down, injuring his leg and crushing his foot"; and it was further alleged that the injury was due to the negligence of the defendant railroad company in various particulars to which more detailed reference will be made later.

Respondent introduced no testimony at all as to the manner in which his injury was sustained other than his own, he being his only witness as to the actual circumstances connected with his injury and the manner in which it was received will be found in the Record at pages 28-30. It is rather obscure, and it would probably be somewhat clearer if read in full from the record, but it is obviously too long to quote.

The substance of this direct testimony of respondent is that on the afternoon preceding his injury he was instructed by the roadmaster to load ten rails on the next morning and ship them to McFarlane, N. C.;

that he was told to get a flat car and if he could not get a flat car to get a gondola; that he could not get a flat car and was furnished a gondola, and (to use his own language) "I told them if they sent a gondola I would not be able to load it from where the rails are at"; that he was told (using his own language again) "to put up some skids and load them from the side and take some short rails and load from the side and get some rope and load from the side" (R. 29).

He then testified as to the manner in which his injury was sustained as follows (R. 30): "Three men on the ground and myself and two men in the car. We pulled the rail on this end to about six or eight inches and then tied the rope over here and go back and pull this end of the rail up until we got it within our reach. The men on the ground pushed and stayed there until the men could come around the car and get in, by taking the rope off while they were coming around and walking over and laid it on the end of the car and I turned around and came back and the men pulled the rail just as I was walking up the car and the rail turned and come on me and hit my leg, and I slipped down and my leg jerked me back into it." He also further testified (R. 30) that if he had been furnished a flat car the rail could have been pushed up without getting it out of reach of the men on the ground.

It perhaps should be observed in passing that Mr. Dail, the roadmaster, took issue with respondent's version of his instruction. Mr. Dail testified (R. 68) that he instructed respondent to load ten rails and ship them, and that he had no further connection with the transaction and heard nothing further from it until it was reported to him that respondent had been injured.

The cross examination of the respondent Haselden is important and throws much light on the situation. It is too long to quote verbatim, but it will be found in the Record at pages 37-39.

The substance of this cross examination of the respondent Haselden is to the effect that he had been a section foreman since July 3, 1944; that loading rails was one of his regular duties and that he had loaded them before; that he was instructed to load ten rails from a pile of about forty across a ditch from the railroad; that he selected the rails to be loaded; that his crew other than himself consisted of five men, who were hired by him and who started work, stopped work and did their work under his instructions, he being in charge of them; that he had a new rope and a chain strong enough to load; that nothing about the equipment broke; and that five rails had already been successfully loaded into the car in the same manner as the sixth rail, which caused the injury, was being loaded.

We believe it will be very evident from an examination of the record that respondent must base his right to recover on these three alleged delicts: (1) one of the rails was bent and consequently caught on the gondola thereby causing the loose end to spring over and strike him (R. 6); (2) he was not furnished enough men to load the rails (R. 29); (3) a gondola car was furnished for the loading instead of a flat car (R. 30).

In the light of the decisions of this Court, which of course has the final word in cases arising under the Federal Employers' Liability Act, it is respectfully submitted that there has been a total failure of proof of any actionable breach of duty on the part of petitioner in either of the three particulars above stated.

As held by the Court in *Ellis vs. Union Pac. R. R. Co.*, 329 U. S., 649:

> "The act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury."

In *Missouri Pac. R. R. Co. vs. Aeby*, 275 U. S., 426, a case involving an injury to an employee due to an alleged defect in a station platform, it was said in relation to the duty of the master:

> "Its duty in respect of the platform did not make petitioner an insurer of respondent's safety; there was no guaranty that the place would be absolutely safe. The measure of duty in such cases is reasonable care having regard to the circumstances."

The master is not required to supply any particular type of place to work or tools or appliances with which to work, or to maintain them in the safest and best possible condition.

> "It is a well-established rule that the master is not bound to furnish the latest or best tools or appliances for the use of his servants. That rule is applicable here, and we hold that defendant was not liable for failure to furnish the best mechanical contrivances and inventions, or to discard appliances upon discovery of later improvements, provided the boiler was in proper condition and safe to operate, as required by the statute."
>
> *Baltimore & Ohio R. R. Co. vs. Groeger*, 266 U. S., 521.

"The petitioner was not required to have any particular type or kind of platform or to maintain it in the safest and best possible condition. Baltimore & O. R. Co. v. Groeger, 266 U. S., 251, 529, 69 L. ed. 419, 424, 45 Sup. Ct. Rep. 169. No employment is free from danger. Fault or negligence on the part of petitioner may not be inferred from the mere fact that respondent fell and was hurt."

Missouri Pac. R. R. Co. vs. Aeby, 275 U. S., 426.

In *Brady vs. Southern Ry. Co.*, 320 U. S., 476, a case involving a fatal injury to an employee when a freight car went off the track in passing over the wrong end of a derailer while being backed into a switch track, the Court in holding that there was a failure of proof of actionable negligence said:

"The Supreme Court of North Carolina was of the view that striking a derailer from the unexpected direction 'was so unusual, so contrary to the purpose' of the derailer that provision to guard against such a happening was beyond the requirement of due care. With this we agree. Bare possibility is not sufficient. Milwaukee & St. P. R. Co. v. Kellogg, 94 US 469, at 475, 24 L. ed. 256, at 259:

" 'But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'

"Events too remote to require reasonable prevision need not be anticipated. * * *."

It was also further said in the Brady case:

> "The mere fact that with a sound rail the accident might not have happened is not enough. The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events."

It cannot reasonably be said that the fact that there was a bent rail in a pile of forty rails, from which respondent was directed to load ten rails on a car (R. 38), constituted any actionable breach of duty on the part of the petitioner. It cannot be deemed an unusual operation for a section crew to load rails to be shipped to other points. In fact, respondent testified (R. 37) that this was one of the usual duties which he had previously performed, and it certainly cannot be reasonably suggested that because a rail is bent it must not be shipped. It is inevitable that if rails are used they must sometimes become bent. Aside from these considerations, however, how can it be said that petitioner should have foreseen that respondent, an experienced workman, would select a bent rail from a pile of forty rails in order to make out the ten rails to be shipped, and that the bent rail would get caught on the car onto which it was being loaded and spring over and injure him? There is no evidence that an attempt to load a bent rail on any other occasion had resulted in injury to anyone, nor is there anything in the record to indicate that the presence of a bent rail in the pile of forty rails was due to any negligent or wrongful act on the part of petitioner, or that resulting injury to the respondent ought to have been foreseen in the light of attending circumstances. As well said in *Boyleston vs. Southern Ry. Co.*, 211 S. C., 232, 44 S. E. (2d), 537:

> "Negligence carries with it liability for consequences which, in the light of attendant cir-

cumstances, could reasonably have been anticipated by a prudent man, but not for injuries which though possible, were wholly improbable. One is not charged with foreseeing that which could reasonably not be expected to happen."

It seems equally clear that it cannot be fairly said that petitioner failed to exercise reasonable care in furnishing a sufficient number of men to load the rails. How can it be said that petitioner ought to have foreseen that six grown men experienced in this kind of work, respondent and five others selected by him, were not enough to load the rails, especially in view of the fact that these same men on that same morning already had loaded five rails of the same kind in the same manner and in the same car without trouble or mishap. There is a total absence of testimony that the number of men was insufficient to load these rails, and as a matter of fact, respondent's complaint is not based upon any such theory, but upon the wholly different theory that due to the fact that one of the rails was bent it caught on the gondola, causing the loose end to spring over and strike plaintiff (R. 6).

As to the charge in relation to furnishing a gondola car for the loading instead of a flat car, to surmise that if a flat car had been furnished instead of a gondola the accident might not have happened is not enough, and we respectfully submit that there is no word of testimony upon which to base such an inference. As said in *Brady vs. Southern Ry Co.*, 320 U. S., 476: "The mere fact that with a sound rail the accident might not have happened is not enough. The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events."

Furthermore the record will be searched in vain for any evidence that a gondola car is not a proper instru-

mentality on which to load rails, and if there were any statement to that effect it would be abundantly disproved by the fact that five rails had been safely loaded into a gondola on that morning in the same way and by the same men without difficulty or injury to anyone. Also there is no evidence that additional help had been required on previous occasions or that the loading of rails on a gondola on any other occasion had resulted in injury to anyone.

Point II

Did the State Supreme Court Err in Sustaining the Submission for the Consideration of the Jury of Specifications of Negligence Not Supported by Evidence and Not a Proximate Cause of the Injury?

In *Wilmington Star Mining Co. vs. Fulton*, 205 U. S., 60, the Court said:

> "The remaining assignments assert the commission of error by the trial court in overruling motions to strike out the 2d, 3d, and 6th counts of the declaration, and in refusing to instruct the jury that no recovery could be had under any of those counts, because no evidence had been introduced tending to establish the commission of the particular acts of negligence charged in those counts. Such counts, as we have seen, related to the failure to construct crosscuts and stoppings in the mine, and to an alleged defect resulting from the absence of a wheel, and the consequent necessity of using a wrench for the purpose of opening a valve to allow condensed steam to escape as a prerequisite to the movement of the ventilating fan. We are constrained to the con-

clusion that prejudicial error was committed in these particulars."

In the same case the Court also had the following to say in relation to the effect of an Illinois statute which it was claimed rendered the errors complained of not prejudicial:

> "This statute, of course, lends no support to the contention here made that where a jury is wrongfully permitted, over the objection of the opposing party, to take into consideration, in reaching a verdict, counts of a declaration which have not been supported by any evidence, and where it is impossible from the record to say upon which of the counts of the declaration the verdict was based, that the judgment entered under such circumstances can be sustained upon the theory that substantial rights of the objecting party had not been invaded."

The question also arose in the case of *Chicago St. P. M. & O. Ry Co. vs. Kroloff*, (8th Cir.), 217 Fed., 525, in which it was said:

> "A refusal by the court to grant a specific request to withdraw from the jury one of several specific charges of negligence on which the plaintiff is seeking to recover is fatal error, if there is no substantial evidence to sustain that charge, although there may be evidence to sustain others, because the presumption is that error produces prejudice, and the appellate court cannot know that it was not upon that baseless charge that the jury founded its verdict."

Also in *Baltimore & Ohio R. R. Co. vs. Deneen* (4th Cir.), 161 Fed. (2d), 674, it is said:

> "The law is well settled that where there is no

> evidence to sustain certain counts in the declaration as to defendant's negligence, defendant is entitled to an instruction that no recovery can be had on those counts. And failure so to instruct in the instant case was prejudicial error, since it cannot be determined on which count the jury based its verdict against defendant."

See also to the same effect *Southern Ry Co. vs. Hardin* (5th Cir.), 157 Fed., 645; *Murray, et al. vs. Third Nat. Bank* (6th Cir.), 234 Fed., 481; *Lehigh Valley R. R. Co. vs. Normile* (2nd Cir), 254 Fed., 680.

On the trial of the case petitioner moved for a directed verdict separately as to each specification of negligence contained in the complaint on the ground that there was no proof of negligence as to such specification (R. 93). This motion was refused, and the lower Court was sustained by the Supreme Court of South Carolina.

Specification (a) is a follows (R. 6): "In failing to provide plaintiff with a safe place to work in that he was directed to load heavy iron rails across a ditch." Even if it be conceded that directing respondent to load the rails across a ditch would constitute negligence, there is not only no evidence to the effect that respondent received any injury on account of being directed to load rails across a ditch, but the evidence shows affirmatively and conclusively that the loading of rails across a ditch had absolutely nothing to do with his injury. When he was injured five rails had already been loaded from across the ditch and the sixth rail, from which he received his injury, had already been moved across the ditch without mishap and was being placed in the car (R. 39).

Specification (b) is as follows (R. 6-7): "In failing to provide plaintiff with a safe place to work in direct-

ing him to load heavy iron rails with improper equipment and with faulty and weak skids with which to load rails." There is a total absence of any testimony whatever that the equipment was improper, or that the skids were faulty and weak or failed in any manner to perform their function. The testimony of respondent himself shows that there was nothing defective about the loading appliances and that there was no failure of the skids to function (R. 39).

Specifications (c), (d), (e) and (h) (R. 7) will not be discussed here for the reason that they have already been covered by what has heretofore been said under the heading "Was There Sufficient Evidence to Justify Submission of the Case to the Jury?"

Specification (f) is as follows (R. 7): "In failing to provide plaintiff with proper, reasonable, and safe plans and method with which to work in loading said rails as herein set forth." We fail to find any testimony at all in support of this specification. According to respondent's own testimony the loading of rails was one of his duties as section foreman. He himself hired the workmen and had entire charge of the operation (R. 37-39).

Specification (g) is as follows (R. 7): "In failing to provide plaintiff with proper supervision and direction with which to work." We also fail to find any testimony at all to support this specification. On the contrary petitioner's own testimony shows (R. 38) that he himself had the entire supervision and direction of the work.

Point III

Did the Supreme Court of South Carolina Err in Sustaining the Trial Court's Charge to the Jury as to the Employer's Duty in Relation to Furnishing a Safe Place to Work and Safe Tools and Appliances?

Relying largely upon the South Carolina cases of *Nuckolls vs. Great Atlantic & Pacific Tea Co.*, 192 S. C., 156, 5 S. E. (2d), 862, and *Tucker vs. Holly Hill Lumber Co.*, 200 S. C., 259, 20 S. E. (2d), 704, the State Court in its opinion sustained the following charge as a correct statement of the applicable law in relation to the master's duty to furnish a safe place to work and safe tools and appliances (R. 99, 134, 135):

> "Now, I charge you, gentlemen, that there is a positive duty on the part of the master to furnish the servant with reasonably safe instrumentalities wherewith and places wherein to work. The master is required to furnish his servant with such proper tools and appliances as may be required for the reasonable safe prosecution of the work. To make the master liable for failure to furnish tools and appliances it must be shown that the tools and appliances were necessary, and that they were not at hand at the time."

In sustaining this charge it is respectfully submitted that the State Court failed to give effect to the rule that State decisions are inapplicable in a suit under the Federal Employers' Liability Act, and that the duty of the employer is governed wholly by the Federal law without regard to the State law, as thus stated in *Bailey vs. Central Vermont Ry.*, 319 U. S., 350: "The rights which the Act creates are federal

rights protected by federal rather than local rules of law."

The State Court also cites in support of its conclusion *Patton vs. Texas and Pac. Ry. Co.*, 179 U. S., 658, in which the duty of the master to furnish a safe place to work is referred to as "positive." It may be observed, however, that this case was decided in 1901 and was not a case arising under The Federal Employers' Liability Act. Furthermore, it should be observed that the context clearly indicates that the Court used the word "positive" in the sense of "nondelegable." In this connection it was said: "That while the employer is bound to provide a safe place and safe machinery in which and with which the employee is to work, *and while this is a positive duty resting upon him, and one which he may not avoid by turning it over to some employee, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe.*" (Emphasis added by petitioner).

The State Court further cites in its opinion the case of *Bailey vs. Central Vermont Ry. Co.*, supra, in support of the charge of the trial Judge. It is respectfully submitted, however, that a careful reading of the case will show that it is not in point and makes no reference to the point in issue, but if in point at all that it tends to support the position of petitioner rather than that of respondent. In this case, *Patton vs. Texas & Pacific Ry. Co.*, supra, is cited but in relation to a totally different question.

The State Court in its opinion also quotes in support of its approval of the charge of the trial Judge the following from Vol. 33, page 57, of Words and Phrases:

> "In an action for injuries to a servant, a charge that 'the master owes the positive duty to an employee to provide him with a reasonably safe place in which to work, so far as the nature of the work undertaken and the exigencies of the case will permit the same to be made reasonably safe,' is a correct statement of the law, and *is not objectionable as requiring the master to insure the safety of the place; the word 'positive' being used rather as the antithesis of the word 'delegable' than as a measure of the diligence required of a master.* Harris vs. Brown Bay Logging Co., 106 P. 152, 154, 57 Wash. 8." (Emphasis added by petitioner.)

The foregoing statement from Words and Phrases is based upon the Washington case of *Harris vs. Brown's Bay Logging Co.*, 57 Wash., 8, 106 Pac., 152, and the part of the quotation we have underscored plainly shows that the word "positive" was used in the sense of "nondelegable" *rather than as a measure of the diligence required of the master.* As to the same case also see note 14 (a) 49 Corpus Juris, page 1089.

It has been definitely and positively settled by the decisions of the Supreme Court of the United States that the employer does not owe an absolute duty to provide a safe place to work and safe tools and appliances but is only required to exercise reasonable care to that end.

In *Seaboard Air Line Ry. vs. Horton*, 233 U. S., 492, an action under the Federal Employers' Liability Act, the Supreme Court of North Carolina sustained as proper the following charge in relation to furnishing a safe place to work and safe appliances:

> "If you find from the evidence that it (the locomotive engine) was turned over to him without the guard, and if you further find from the evidence that the guard was a proper safety provision for the use of that gauge, and that it was unsafe without it, then the defendant did not furnish him a safe place and a safe appliance to do his work, and if it remained in that condition it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if you so find by the greater weight of the evidence, you should answer the first issue, 'Yes' ".

In holding this to be an incorrect statement of the law the Supreme Court of the United States said:

> "The instructions above quoted imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care. In effect, the jury was instructed that the absence of the guard glass was conclusive evidence of defendant's negligence. In this there was error."

In the case of *Yazoo and Mississippi Valley R. Co. vs. Mullins*, 249 U. S., 531, plaintiff recovered judgment in an action under the Federal Employers' Liability Act. Upon review by the United States Supreme Court, it was contended that the trial judge erred in his charge respecting the master's duty regarding the safety of his servant's place of work. In its opinion on this question the Court said:

> "It may be, as contended by the administratrix, that there was sufficient evidence of negligence to go to the jury, and that the general instruc-

> tions concerning negligence were proper. But the trial court also instructed the jury that 'it was the absolute duty of the defendant to furnish the deceased with a safe place to perform the duties incident to his employment.' It is clear that, under the circumstances of this case, the duty was not an absolute one; there was merely a duty to use reasonable care. (Citing numerous authorities). As examination of this record does not convince us that the admitted error was harmless, the judgment of the Supreme Court of Mississippi is reversed."

In *Baltimore & Ohio S. W. R. Co. vs. Carroll*, 280 U. S., 491, plaintiff recovered judgment in an action under the Federal Employers' Liability Act, and a similar question was presented regarding the trial Judge's instructions relative to the master's duty. We quote from the Court's opinion the following:

> "On the other hand, the charge in respect to the duty of the employer to furnish safe appliances was without qualification, and the jury might well have understood that the duty was an absolute one. That is not the law. The employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end."

The Supreme Court of South Carolina adverts to the fact that in the cases from the Supreme Court of the United States here referred to the word "absolute" was used while the word "positive" was used in this case, and it is then suggested that the terms are not synonymous. We respectfully submit, however, that the Court has not given due weight to the fact that the same word is often used in different senses. The word

"positive" as used in the authorities relied upon by the State Court was used in the sense of "nondelegable", as previously pointed out, but in the charge of the trial Judge in this case it was plainly used in the sense of "absolute", and it could not possibly have been understood otherwise by the jury.

That "absolute" and "positive" may properly be considered synonymous will appear from the definition of the word "positive" in 49 C. J., 1089, where the first definition given is "absolute". This is also illustrated by the following quotation from the opinion of the Court in *Lehigh Valley R. R. Co. vs. Beltz* (2nd. Cir.), 10 Fed. (2d), 74:

> "*An 'absolute' duty is one which is not subject to any limitation or condition. It is positive and not dependent.* It is unqualified by any condiditions or considerations whatsoever. If the Boiler Inspection Act imposed on the defendant an absolute duty to have the boiler and appurtenances thereof safe to operate, and substituted that rule for the common-law rule, which holds the employer to ordinary care to provide his employees a reasonably safe place in which, and reasonably safe appliances and machinery with which to work, it in effect makes the employer an insurer of the safety of the place in which the employee works and of the appliances with which he works." (Emphasis added by petitioner.)

Even should it be conceded that the words "positive" and "absolute" cannot be deemed in any sense synonymous, nevertheless the remaining part of the charge complained of permits no doubt that the trial Judge used language which of itself imposed an absolute duty to furnish a safe place to work and safe tools and appliances with which to work. After stating in the

first sentence that the duty is positive, in the very next sentence the jury is instructed that "the master is required to furnish his servant with such proper tools and appliances as may be required for the reasonably safe prosecution of the work", and this is not coupled even with any intimation that the duty of the master goes no farther than the exercise of reasonable care to the end that the tools and appliances may be reasonably safe. The next sentence is even stronger in emphasizing the idea that the duty of the master is absolute. The trial Court there says: "To make the master liable for failure to furnish tools and appliances it must be shown that the tools and appliances were necessary, and that they were not at hand at the time". It is difficult to conceive how the jury could have been more explicitly instructed that the duty of the master is absolute.

In Labatt's Master and Servant (2nd. Ed.), Vol 3, section 920 (25), will be found the following very applicable statement of the law on this subject:

> "A jury is correctly instructed that a master does not insure his servants against injury. On the other hand, a verdict against the master will not be allowed to stand, where the trial judge has expressly laid it down that an instrumentality must be kept in such repair as to insure the safety of persons using it, nor where, although he has not used the word 'insure' in stating the nature and extent of the master's obligation, he has used language which may have been construed by the jury in such a sense that they supposed him to be absolutely bound to safeguard his servants. Hence it is error to use the epithets 'safe,' 'secure,' 'safe and sound,' or the like, for the purpose of describing the instrumentalities which the master is

> bound to furnish, unless it is also made quite clear to the jury that he is only required to use ordinary care in furnishing instrumentalities answering this description."

We do not think the additional suggestion of the Supreme Court of South Carolina to the effect that taking the charge as a whole it is free from error can possibly be sustained. The portion of the charge quoted by the State Court to sustain this statement (R. 135) seems only to further emphasize the impression which the jury must have received that the duty of the master to furnish a safe place to work and safe tools and appliances is absolute. Taking the parts of the charge we have quoted, as well as the charge as a whole, it is extremely difficult to conceive how the jury could possibly have received any other impression than that the master is held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, rather than only to the duty of exercising reasonable care to that end.

It is respectfully submitted that the State Court imposed upon petitioner in this case the duty required in a suit under the Safety Appliance Act and the Boiler Inspection Act, which is absolute, and not the duty imposed by the Federal Employers' Liability Act. *Brady vs. Terminal R. R. Assn.*, 303 U. S., 10; *Lilly vs. Grand Trunk Western R. R. Co.*, 317 U. S., 481.

The State Court also seems to imply that petitioner's counsel were required to call attention to the error when at the conclusion of the charge the trial Judge inquired if there was anything further (R. 104). Whatever may be the rule in the Federal Courts, it is not the rule of procedure in the Courts of South Carolina that counsel are required to call attention to errors of law in the charge of the Judge. Counsel is

required to call attention to a misstatement of the issues but not of the law. *Pinson vs. South Atlantic Realty Co., et al.*, 118 S. C., 262, 110 S. E., 392; *Steinberg vs. S. C. Power Co.*, 165 S. C., 367, 163 S. E., 881; *Coleman vs. Lurey*, 199 S. C., 442, 20 S. E. (2d), 65.

It can scarcely be contended that the charge of the trial Judge of which complaint is made was harmless. In jury trials erroneous rulings are presumptively harmful. As said in *Fillippon vs. Albion Vein Slate Co.*, 250 U. S., 76: "And, of course, in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless."

CONCLUSION

In conclusion it is respectfully submitted that a writ of certiorari should be issued to the Supreme Court of the State of South Carolina to the end that this cause may be reviewed and determined by this Court as provided by law.

Respectfully submitted.

CHARLES COOK HOWELL,
Wilmington, N. C.
V. E. PHELPS,
Wilmington, N. C.
Attorneys for Petitioner.

T. D. PAULLING,
Darlington, S. C.
JOHN F. WILMETH,
Hartsville, S. C.
A. F. WOODS,
Marion, S. C.
M. C. WOODS, JR.,
Marion, S. C.
Of Counsel.